from taking reasonable steps to avoid the risk of causing injuries to others within the area of potential danger. When the first defendant started the engine, the second defendant knew that the deceased was standing very close behind the lorry near the rear near-side wheel. Since the vehicle was going forward and having regard to the nature of the road and the dangerous position of the deceased in relation to the metal plate, I find there was a real and substantial risk or chance that the metal plate would fly off backwards hitting anyone who happens to be on its path. In failing to warn the deceased from standing within the area of potential danger, the first and second defendants must be regarded as negligent under the circumstances of the present case. In my judgment, it is the duty of the defendants to exercise reasonable care by ensuring that there are no road users within the area of potential danger before starting the engine of the motor lorry. The negligent act of the defendants is not so much in the insertion of the metal plate under the wheel but rather in starting the engine when the deceased was behind the lorry and where there was a real risk that the metal plate would fly backwards. The act of the defendants involves lack of due care and attention; and since the duty to take care exists, I find them liable for negligence. To my mind, this case does not come within the qualification recognised in *Bolton* v. *Stone (ante)* as to the general principles that a person must be regarded as negligent if he does not take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man.

On the second point, Mr. Segaram concedes that there is contributory negligence on the part of the deceased. I think a bystander like the deceased who failed to take reasonable steps to protect himself from obvious danger could not be completely free from blame. Having regard to all the circumstances, it would be equitable that liability in this case should be apportioned on the 50: 50 basis.

As regards quantum, special damages have been agreed to at $1,100 on 100 per cent liability. As regards general damages, both parties have agreed on loss of dependency at $170 per month. As to the number of years purchase, I have taken into consideration the fact that the deceased was a pig-breeder by occupation and was forty-one years of age at the time of his death. From the uncontradicted evidence of the deceased's widow (PW1), the deceased was a healthy man prior to his death. Taking into consideration the other contingencies in life, I consider fourteen years purchase would be fair and reasonable in this case. On 100 per cent liability, general damages would come to $20,196. For the claim under section 8 of the Civil Law Ordinance, I would award a sum of $3,000 on behalf of the estate of the deceased. This sum will, of course, merge into the award under section 7. Under the circumstances, I enter judgment for the plaintiffs in the sum of $550 as special damages and $10,098 as general damages and costs. As regards special damages, I order that the sum of $550 be paid direct to the widow. With regard to general damages, I order that the sum of $10,098 be apportioned as follows: —

(i)	Widow - - - - - - -	$4,348
(ii)	Low Soh Hee (f) - - - -	$ 250
(iii)	Low Soo Chow (f) - - - -	$ 500
(iv)	Low Tong Kiew (m) - - - -	$ 500
(v)	Low Tong Wah (m) - - - -	$ 500
(vi)	Low Soh Kim (f) - - - -	$ 500
(vii)	Low Tong Po (m) - - - -	$1,000
(viii)	Low Tong Howe (m) - - -	$1,000
(ix)	Low So Hun (f) - - - -	$1,500

Money payable to the minor children Nos. (iii) to (ix) to be paid to Public Trustee in trust for them until they reach the age of majority.

As regards interest, I award 3 per cent on special damages from date of accident (April 21, 1968) to date of judgment, and 6 per cent on general damages from date of service of writ (April 15, 1969) to date of judgment.

Order accordingly.

Solicitors: *M. Segaram & Co.; Lovelace & Hastings.*

ALI MAT BIN KHAMIS v. JAMALIAH BINTI KASSIM

[A.C.J. (Wan Suleiman J.) September 11, 1973]
[Seremban — Civil Appeal No. 1 of 1971]

Practice and Procedure — Jurisdiction of Magistrate's Court — Action or suit for recovery of immovable property — Question of title raised — Harta Sapencarian — Whether High Court has jurisdiction to hear case — Subordinate Courts Act, 1948, s. 70 — Administration of Muslim Law Enactment, Negri Sembilan, 1950, s. 41(3) — Courts of Judicature Act, 1964, s. 23.

Malay Customary Law — Adat — Harta sapencharian — Whether High Court has jurisdiction to deal with.

The appellant had claimed possession of a house and land which he claimed he purchased. The respondent was the wife of the appellant but after she was divorced, she continued to stay in the house. The respondent claimed that the land and house was *harta sapencarian*. The learned magistrate decided that he had no jurisdiction as on the pleadings the dispute related to the title to immovable property. He also held that the Court of the Kathi Besar had exclusive jurisdiction on the issue of *harta sapencarian* and that that court should adjudicate on that issue before anything further could be done. The appellant appealed.

Held: (1) in this case what appeared at first to be an action for the recovery of possession of immovable property had in view of the defence become one in which the question of ownership of the property was raised and therefore the learned magistrate had rightly decided that he had no jurisdiction to hear the case;

(2) the High Court had jurisdiction to deal with the issue of *harta sapencarian* and therefore the action should be transferred to the High Court.

Case referred to:-

(1) *Hiew Kim Swee* v. *Gomez* [1955] M.L.J. 170 at p. 174.

CIVIL SUIT.

K. Gunaretnam for the appellant.

Leow Shin Fong for the respondent.

Wan Suleiman J.: This is an appeal brought against the decision of the learned magistrate, Serem-

ban, who after considering preliminary submissions by counsel for both sides, decided that on the pleadings the dispute related to immovable property in consequence of which his jurisdiction was ousted. He also gave another reason why he thought he had no jurisdiction to hear this action about which I shall have more to say later.

In his statement of claim, plaintiff alleged that he had purchased the house and land from the Negri Sembilan Development Corporation, paid the initial deposit and was still paying instalments. It would be reasonable to infer, and indeed counsel for the plaintiff did suggest in his submissions that plaintiff had gone into occupation under an agreement with the corporation, which was in the nature of an agreement to purchase the land giving the plaintiff certain contractual rights. The exact nature of such rights are not on record.

Plaintiff who was married to the defendant lived together with her until their divorce, when it would appear that the defendant alone remained in occupation, and stayed on after the expiry of the period of *"eddah"* on 24th June, 1969.

The remedy plaintiff sought was apparently recovery of possession of immovable property. However in paragraph 8 of the plaint he averred:—

"The said house and land does not fall within the definition of any one of the following:—

(a) *Harta sapencharian*
(b) *Harta Sharikat*
(c) *Harta Charian laki bini*

and does not fall within the specialized meaning in the context of 'property acquired during the subsistence of their marriage by a husband and wife out of their joint resources or by their joint efforts'."

In paragraph 8 of the statement of defence the defendant averred that

"the said house and land were acquired subsequent to the marriage of the parties herein out of the defendant's resources or in the alternative out of their joint resources or by their joint efforts and the property is *harta sapencharian.*"

The defendant also counterclaimed for maintenance and other sums allegedly due from the plaintiff consequent upon the divorce.

Plaintiff's reply again repeated that the deposit and various instalments had been paid by him alone. I do not propose to deal with the reply to the counterclaim which is not relevant for the purposes of deciding this appeal.

It appears to me that what may at first sight appear to be an action for recovery of *possession* of immovable property has in view of the defence, become one in which the question of ownership of the property is raised.

Learned counsel for the appellant has drawn my attention to the procedure recommended in cases such as the present one by Thomson J. (as he then was) in *Hiew Kim Swee* v. *G. C. Gomez.*[1] However as His Lordship remarked in that case

"I am not deciding that in every case it is necessary for the magistrate to try the case out to the very end before deciding whether or not he has jurisdiction".

I am not prepared to say that the learned magistrate was wrong at the close of preliminary submissions in ordering the transfer of this action to this court.

The learned magistrate clearly held the view that the Court of the Kathi Besar had exclusive jurisdiction on the issue of *"harta sapencharian"* so that that court should adjudicate on this issue before anything further can be done.

The relevant portion of the Administration of Muslim Law Enactment No. 15 of 1960 (Negri Sembilan) reads as follows:—

"Section 41(3)—

(3) The court of the Kathi Besar shall—

(a) ....

(b) in its civil jurisdiction, hear and determine *all* actions and proceedings in which all the parties profess the Muslim Religion and which relate to:

(i) ....

(ii) ....

(iii) ....

(iv) division *inter vivos* of *sapencharian* property;"

No doubt Article 74(2) read with List II of the 9th Schedule of the Federal Constitution empowers a State to make legislation *inter alia* for "the determination of matters of Muslim Law and doctrine and Malay custom."

It cannot be denied that *"harta sapencharian"* is a matter of Malay custom. Does this mean that once any other court is satisfied that the action before it involves "division *inter vivos* of *sapencharian* property" it ceases to have jurisdiction and should transfer such case to the Court of the Chief Kathi?

I do not intend to deal with the question of whether the State legislature has the power to exclude the jurisdiction of, for instance, the High Court in sapencharian matters, but I would not hesitate to hold that, short of specific words to that effect, the above provision of the Negri Sembilan Enactment was not intended to take away the jurisdiction in civil matters given to a High Court by section 23 of the Courts of Judicature Act, 1964 (Act 91).

Accordingly the order made by the learned magistrate is varied to the extent that this action shall be transferred to this court.

Costs to be costs in the cause.

Order accordingly.

Solicitors: *Yazid Baba & Co.; Shearn Delamore & Co.*